

COMPREHENSIVE AGREEMENT

between

CITY OF NORFOLK, VIRGINIA

and

NORFOLK PUBLIC SCHOOLS

and

S.B. BALLARD CONSTRUCTION COMPANY

for

DESIGN AND CONSTRUCTION OF FOUR SCHOOLS

_____, 2014

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COMPREHENSIVE AGREEMENT

THIS COMPREHENSIVE AGREEMENT (this “Agreement”) is entered into as of _____, 2014, between the **CITY OF NORFOLK, VIRGINIA** (the “City”) AND **NORFOLK PUBLIC SCHOOLS** (“NPS”) (the City and NPS, collectively, “the Owner”), a municipal corporation and political subdivision of the Commonwealth of Virginia, and S.B. Ballard Construction Company (“S.B. Ballard” or “the Design-Builder”). The Owner and the Design-Builder are referred to individually as a “Party” and collectively as “the Parties”.

Recitals

WHEREAS, on April 9, 2013, the City of Norfolk (the “City”) adopted Guidelines under the Public-Private Education Facilities and Infrastructure Act of 2002, Va. Code § 56-575.1, *et seq.* (“PPEA”) establishing procedures for the development of public facilities through public-private partnerships pursuant to Va. Code § 56-575.3:1 of the PPEA (the “PPEA Guidelines”); and

WHEREAS, on June 25, 2013, the City amended the PPEA Guidelines and the current version of the PPEA Guidelines is found at Section 33.1-110, *et. seq.* of the Norfolk Code; and

WHEREAS, on March 27, 2013, the Design-Builder submitted an Unsolicited PPEA Proposal (the “Conceptual Proposal”) under the PPEA to provide certain design, permitting, development and construction services in connection with the construction of five schools (as more fully described hereinafter, individually, a “Project” and, collectively, the “Projects”); and

WHEREAS, on or about September 29, 2013, the Owner issued a Request for Proposals (“RFP”) and invited for consideration competing proposals, to be submitted to the Owner on or before 3:00 p.m. on November 26, 2013; and

WHEREAS, three (3) proposals were received by the Owner for conceptual stage consideration, including a more detailed proposal from the Design-Builder. Pursuant to the Guidelines, the Owner subsequently posted the three (3) proposals for conceptual stage consideration on the City’s website and made such conceptual stage proposals available for public inspection; and

WHEREAS, the Owner determined that, among other things, that it would be advantageous for the Owner to proceed with the Projects using procedures for competitive negotiation, rather than sealed, competitive bids, given the probable scope, complexity and urgency of the Projects; the merits of risk-sharing and the potential for added value; and the economic benefit from the Projects that might otherwise not be available; and

WHEREAS, after reviewing the conceptual stage proposals, on or about December 20, 2013, the Owner selected all three (3) proposals to advance to the detailed review stage in accordance with the Guidelines, retaining the right to reject any proposal at any time for any reason; and

WHEREAS, on or about January 21, 2014, the Design-Builder submitted its detailed proposal (the “Detailed Proposal”) to the Owner for detailed stage consideration; and

WHEREAS, after review of the Detailed Proposal, the Owner selected Design-Builder for negotiation of an interim agreement under the PPEA for certain architectural, engineering and other services related to the Projects based upon Design-Builder’s Conceptual Proposal, its Detailed Proposal and oral presentations, and upon the Owner’s evaluations of those proposals and presentations. For the purposes of this Agreement, S.B. Ballard Construction Company, the Design-Builder, shall be the “Private Entity” as defined in the PPEA; and

WHEREAS, after holding a public hearing on the proposals on May 13, 2014, the Owner completed negotiation of an interim agreement with the Design-Builder, which was executed on June 13, 2014 (the “Interim Agreement”), subsequent to posting and approval by the City Council of the City of Norfolk (the “City Council”) in accordance with the PPEA Guidelines; and

WHEREAS, based upon the Design-Builder’s performance under the Interim Agreement and its proposal to complete the design and construction of the Projects, the Parties have negotiated this Agreement consistent with the PPEA, other applicable laws, the PPEA Guidelines, Design-Builder’s Conceptual Proposal and Detailed Proposal, and discussions between representatives of the Owner and the Design-Builder for the Design-Builder to perform the Work for the Campostella K-8 School (the “Campostella Project”), the Broad Creek PK-5 School (the “Broad Creek Project”), the Ocean View PK-5 School (the “Ocean View Project”) and the Larchmont PK-5 School (the “Larchmont Project”), with an option to build Camp Allen PK-5 School (the “Camp Allen Project”) ; and

WHEREAS, the Parties acknowledge and agree that this Agreement, including its exhibits and attachments, and all amendments and modifications thereof, will function as the Comprehensive Agreement pursuant to Section 56-575.9 of the PPEA and Section 33.1-117 of the PPEA Guidelines for purposes of the Projects; and

WHEREAS, Qualified School Construction Bonds (“QSCB”), Qualified Energy Conservation Bonds (“QECB”) and potentially Recovery Zone Economic Development Bonds, or other available tax credit bonds will be used for the Campostella Project and, if it goes forward, federal funds will be used for the Camp Allen Project, but only City Funds will be used for the Broad Creek Project, the Ocean View Project and the Larchmont Project (collectively, the “City Funded Projects”); and

WHEREAS, the Owner and Design-Builder intend to enter into separate Design-Build Contracts for each of the Authorized Projects (as defined below) in order to ensure that (a) each Authorized Project is performed in accordance with the Parties’ understandings concerning financial, technical and scheduling matters related to such Authorized Project, and (b) no federal funding will be used for the City Funded Projects; and

WHEREAS, having negotiated this Agreement and other information, the Owner has determined that the Projects to be designed and constructed pursuant to this Agreement serve the public purposes permitted under Section 56-575.4(C) of the PPEA, and has posted this Agreement

for public inspection in accordance with the PPEA and PPEA Guidelines. The Design-Builder's Conceptual Proposal and the Design-Builder's Detailed Proposal are incorporated herein by reference.

NOW, THEREFORE, in consideration of the Recitals set forth above, and good and valuable consideration as set forth below, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

WITNESSETH:

1. **Incorporation of Recitals.** The foregoing recitals are true and correct and are incorporated herein by reference.
2. **Contract Documents.** The Contract Documents are comprised of the following:
 - a. All written modifications or amendments to this Agreement and/or any written modifications, amendments or change orders to any of the Design-Build Contracts issued in accordance with the General Conditions of Contract;
 - b. This Agreement, including all exhibits and attachments hereto;
 - c. The General Conditions of Contract attached hereto as Exhibit D; and
 - d. Drawings and Specifications prepared and approved in accordance with Article 3 of the General Conditions of Contract.
3. **Definitions.** The following definitions apply to this Agreement. Capitalized terms not defined in this Article 3 or elsewhere in this Agreement shall have the meanings given to them in the General Conditions of Contract.
 - a. "Access Agreements" shall have the meaning set forth in Article 13 of this Agreement.
 - b. "Authorized Projects" means the City Funded Projects, the Campostella Project and, only if it goes forward pursuant to Section 4.b hereof, the Camp Allen Project.
 - c. "Contract Documents" means those documents listed in Article 2 herein.
 - d. "Contract Price" means the amount that the Owner will be obligated to pay the Design-Builder for each Project in accordance with the applicable Project Budget, Article 7 of this Agreement and each Design-Build Contract, but subject to the limit of the Guaranteed Maximum Price, and subject in each case to upward or downward adjustment required or permitted pursuant to this Agreement or such Design-Build Contract.

- e. “Contract Time” for any Project or “Contract Times” for the Projects has the meaning ascribed by Article 9 hereof, as may be adjusted pursuant to the Contract Documents.
- f. “Date of Commencement” means the date described in Article 9.a. herein.
- g. “Design-Build Contract” or “Design-Build Contracts” means, as the context requires, each or all of the contracts entered into by Owner and Design-Builder to complete the Design Professional Services and to perform the Construction entailed in each Project. Each Design-Build Contract shall be in a form mutually agreed by the Parties and on terms and conditions consistent with this Agreement and the General Conditions of Contract.
- h. “Final Completion of the Work”, “Final Completion” or “final completion” for any Project occurs when such Project is completed in full, absolute and strict compliance with the Contract Documents, including the completion of all punch list items for such Project.
- i. “General Conditions of Contract” or “General Conditions” means the Standard General Conditions of the Agreement between Owner and Design-Builder attached as **Attachment “E”** to the Interim Agreement and attached hereto as Exhibit D.
- j. “Guaranteed Maximum Price” shall mean the sum of the Project Budgets for all of the Authorized Projects, including the sum of the Design-Builder Contingencies (as described in Section 7.b below) for all of the Authorized Projects.
- k. “Milestone” or “Milestone Date” means each date or the dates set forth in this Agreement by which a specific component of the Work must be substantially completed by the Design-Builder.
- l. “Project Schedule” means that schedule for each Project set forth in **Exhibit B** hereto, as same may be adjusted pursuant to the Contract Documents.
- m. “Project Budget” means that budget for each Project set forth in **Exhibit C** hereto, as same may be adjusted pursuant to the Contract Documents.
- n. “Schedule of Values” means the schedules of values to be agreed upon by the Parties for each Project consistent with the Project Budget for such Project, which Schedule of Values shall be incorporated in the Design-Build Contract for such Project.
- o. “Substantial Completion of the Work,” “Substantial Completion,” or “substantial completion” with respect to any Project shall have the meaning given in Section 1.01.46 of the General Conditions of the Contract.
- p. “Work” shall have the meaning as given in Section 1.01.50 of the General Conditions of the Contract; provided, however, the Work shall exclude the supply

of electric power, electric poles or other utility services or infrastructure to the Projects.

4. **General Scope.**

- a. The Parties shall enter into a Design-Build Contract for each of the Authorized Projects under which Design-Builder shall perform, provide or cause to be provided all Work required under the Contract Documents for completion of the Authorized Project. The Design-Builder shall be responsible for obtaining all necessary federal, state, and local permits and approvals, and entering access agreements with private landowners or other entities if necessary, and performing the Authorized Projects in compliance with all applicable federal, state and local laws and regulations and the Contract Documents. The Owner shall waive all fees for permits to be issued by the City of Norfolk. It is the intent and agreement of the Owner and the Design-Builder that, unless otherwise specifically set forth in the Contract Documents, the Design-Builder shall perform or provide all Design Professional Services, Construction and related Work that are necessary to complete the Authorized Projects in compliance with the Owner's Project Requirements described in **Exhibit A**.
- b. The Owner may elect, by written notice to proceed given to Design-Builder no later than eighteen (18) months following the date of this Agreement, to proceed with the Camp Allen Project, in which case the Camp Allen Project shall be considered an Authorized Project to be performed by Design-Builder consistent with the Contract Documents under a Design-Build Contract and a Project Budget and Project Schedule mutually agreed to by the Parties. The Date of Commencement for the Camp Allen Project shall be the date set forth in the Owner's written notice to proceed with such Project.

5. **Interpretation; Intent and Incorporation.**

- a. The Contract Documents are intended to permit the Parties to complete the Work and all other obligations under the Contract Documents applicable to each Project within such Project's Contract Time, with the sum of the Contract Prices for the Authorized Projects not to exceed the Guaranteed Maximum Price unless authorized by a Change Order executed in accordance with the General Conditions of Contract. The Contract Documents are intended to be complementary and interpreted in harmony so as to avoid conflict, with words and phrases interpreted in a manner consistent with industry standards. In the event of any inconsistency, conflict, or ambiguity between or among the Contract Documents, the order of precedence among Contract Documents shall be as provided in Article 28 hereof.
- b. Terms, words and phrases used in the Contract Documents, including this Agreement, shall have the meanings given them in this Agreement and the General Conditions of Contract.

- c. In accordance with Article 28 hereof and as more fully provided thereby, the Contract Documents form the entire agreement between the Owner and the Design-Builder. No oral representations or other agreements have been made by the Parties except as specifically stated in the Contract Documents.
- 6. **Ownership of Work Product.** Sections 3.05 and 3.06 of the General Conditions of Contract shall govern the ownership, use and modification of the documents (including the Drawings and Specifications) prepared or furnished by the Design-Builder under this Agreement on a Project-by-Project basis.
- 7. **Contract Price.**
 - a. **Contract Price and Guaranteed Maximum Price.** The Owner shall pay the Design-Builder the Contract Price for all Work performed on each Authorized Project in accordance with the Design-Build Contract for such Authorized Project, less the balance of the Design-Builder Contingency for such Project that is not applied to such Project in accordance with Section 7.b below. The Contract Price for each Authorized Project shall be determined in accordance with the Project Budget for such Project and shall be subject to adjustment in accordance with the provisions of the Contract Documents. The Guaranteed Maximum Price (“GMP”) for the Authorized Projects (excluding the Camp Allen Project) shall not exceed One Hundred One Million Seventy-five Thousand and no/100 Dollars (\$101,075,000.00), subject to adjustments to the GMP made in accordance with this Agreement. If the Parties proceed with the Camp Allen Project in accordance with Section 4.b above, then the GMP shall be increased by the Contract Price for the Camp Allen Project, subject to adjustments to the GMP made in accordance with this Agreement. By written agreement of the Parties, any unapplied balance of the Design-Builder Contingency on one Project may be transferred to another Project, including the Camp Allen Project. Unless otherwise provided in the Contract Documents, the Contract Price and the GMP are deemed to include all sales, use, consumer and other taxes imposed by law or any governmental authority. In no event shall the Owner be required to pay the Design-Builder more than the GMP, subject to any adjustments in the GMP made as a result of Change Orders executed in accordance with the General Conditions of Contract.
 - b. **Design-Builder Contingency.** The “Design-Builder Contingency” is defined as that component of the Contract Price set forth in the Schedule of Values for each Project expressly identified as the contingency in such Schedule of Values set aside to address the cost of items of the Work that were reasonably unforeseen by the Design-Builder at the time the Contract Price was developed. Such potential costs include, but are not necessarily limited to: refinements to the Contract Documents as a result of the continuing development of the design, scope gaps between trade contractors, contract default by Subcontractors, costs of corrective Work not provided for elsewhere, constructability issues and issues related to field conditions which Design-Builder reasonably failed to detect during discharge of any preconstruction Work provided by this Design-Builder. The Design-Builder Contingency is not intended to address the cost of Project scope changes made after

the Contract Price was developed (for which Change Orders will be issued pursuant to the General Conditions of Contract). The Design-Builder Contingency may be applied to any Work or other component of the Contract Price without the necessity of a Change Order. Application of any portion of the Design-Builder Contingency does not change the Contract Price, but does increase the amount of money to be paid to the Design-Builder for the Work while simultaneously and equally decreasing the amount of money remaining in the Design-Builder Contingency. Use of the Design-Builder Contingency may only be made with the written approval of the Owner. Such approval will not be unreasonably withheld. The Owner shall specify the procedure for the Design-Builder to request the use of any portion of the Design-Builder Contingency. The Design-Builder shall periodically report to the Owner as is mutually agreeable but no less than monthly specifying: the amount of the Design-Builder Contingency used, the reasons for the requirement, and the justifications for the use of the Design-Builder Contingency. By written agreement of the Parties, any unapplied balance of the Design-Builder Contingency on one Project may be transferred to another Project including the Camp Allen Project. Unless otherwise approved by the Owner, the unapplied balance of the Design-Builder Contingency for a Project remaining at Final Completion of such Project shall be retained by the Owner. The Design-Builder may request approval from the Owner to move Design-Builder Contingency funds from any of the individual Projects to any other Project including the Camp Allen Project. The Owner, at its sole discretion, may approve the moving of such Contingency funds.

- c. **Markups for Changes.** If the GMP requires an adjustment due to changes in the Work, the cost of such changes shall be determined under Sections 9.01, 9.04, 10.01 and 11.01 of the General Conditions of Contract.
- d. **Allowances.** The GMP and each Contract Price include allowances ("Allowances"): the use of and payment for Allowances shall be in accordance with Section 10.02 of the General Conditions of Contract. Any Allowances that are not exhausted shall be credited to the Owner's account.

8. **Payment.**

- a. **Progress Payments.** The Schedule of Values for each Project shall serve as the basis for progress payments under the applicable Design-Build Contract. The Design-Builder shall submit to the Owner by no later than the twenty-fifth (25th) day of each calendar month, beginning with the first full calendar month after the Date of Commencement, the Design-Builder's Application for Payment (as such term is used in the General Conditions of Contract) in accordance with Article 13 of the General Conditions of Contract, for Work performed during the immediately prior thirty (30) days.
- b. **General Conditions of Contract.** The provisions of Article 13 of the General Conditions of Contract are hereby incorporated by reference in this Agreement.

- c. **Retainage on Progress Payments.** The Owner may withhold retainage in accordance with Section 13.02.c. of the General Conditions of Contract. Upon Substantial Completion of each individual Project, the Owner shall release to the Design-Builder all retained amounts relating to such Project, less an amount not-to-exceed 150% of the reasonable value (as determined in accordance with the Schedule of Values for such Project) of all remaining or incomplete items of Work or any defective Work or any portion of the Work that has not been performed in accordance with the Contract Documents as noted in the Certificate of Substantial Completion of the individual Project.
- d. **Final Payment.** The Design-Builder shall submit its Final Application for Payment to the Owner in accordance with Section 13.08 of the General Conditions of Contract for each individual Project. If all portions of the Work on such Project including any punch list items identified by the Owner or the Design-Builder have been completed in accordance with the provisions of the Contract Documents, the Owner shall make payment on the Design-Builder's properly submitted and accurate Final Application for Payment for that Project in accordance with Section 13.08 of the General Conditions of Contract, provided that the Design-Builder has satisfied the requirements for final payment set forth in Section 13.08 of the General Conditions of Contract for the individual Project.
- e. **Interest.** Payments due and unpaid by the Owner to the Design-Builder, whether progress payments or final payment, shall bear interest commencing thirty (30) days after payment is due at a rate of one percent (1%) per month.

9. **Contract Time.**

- a. **Date of Commencement.** The Work for any Project shall commence at the time set forth in the Owner's written notice to proceed pursuant to the applicable Design-Build Contract ("Date of Commencement") unless the Parties mutually agree otherwise in writing.
- b. **Substantial Completion and Final Completion.**
 - i. Subject to the General Conditions of Contract, Substantial Completion of all Work for each Project shall be achieved at the time set forth in **Exhibit B** for such Project ("Scheduled Substantial Completion Date").
 - ii. For any portion of the Work for which a Milestone Date is applicable, as noted in the Project Schedule for the applicable Project, the Design-Builder shall achieve Substantial Completion of such portion of the Work no later than the applicable Milestone Date ("Scheduled Milestone Substantial Completion Date"), subject to the General Conditions of Contract.
 - iii. Subject to the General Conditions of Contract, Final Completion of the Work or identified portions of the Work in connection with any Project shall be achieved at the time(s) set forth in **Exhibit B**, time being of the essence.

- iv. All of the dates set forth in **Exhibit B** or referenced in this Article 9.b shall be subject to adjustment in accordance with the General Conditions of Contract.
 - v. The Owner and the Design-Builder agree and acknowledge that the Work may be accepted in phases before Substantial Completion, and following acceptance of such phase, may be put into use by the Owner. If Work is accepted in phases, then any applicable warranties shall also commence, and responsibility for ensuring that such Work shall transfer to Owner, upon such acceptance. Such partial utilization of the Work shall otherwise be governed by Section 13.06 of the General Conditions of Contract.
- c. **Liquidated Damages.** The Design-Builder and the Owner recognize that time is of the essence with respect to all dates set forth in the Contract, including but not limited to those in **Exhibit B** and any Milestone Dates, and that the Owner will suffer financial loss if the Work is not completed within the times specified in the Contract including any specified Milestone Dates, plus any time extension(s) allowed pursuant to the applicable Design-Build Contract. The Design-Builder and the Owner further recognize the difficulty of proving actual loss to the Owner in the event of a failure to achieve Substantial Completion for any Project in accordance with the Scheduled Substantial Completion Date established in **Exhibit B**. Accordingly, instead of requiring such proof, the Design-Builder acknowledges that the rate of the liquidated damages set forth herein is reasonable and does not constitute a penalty. The Design-Builder agrees that if Substantial Completion for any Project is not attained by the Scheduled Substantial Completion Date for such Project, the Design-Builder shall pay on demand (with copy of such demand given to Design_Builder's surety) to the Owner Fifteen Hundred and no/100 Dollars (\$1,500.00) per day as liquidated damages for each day that Substantial Completion extends beyond the Scheduled Substantial Completion Date for that Project. The liquidated damages provided herein shall be in lieu of all liability for any and all extra costs, losses, expenses, claims, penalties and any other damages, whether special or consequential, and of whatsoever nature incurred by the Owner which are occasioned by any delay in achieving Substantial Completion. The Design-Builder hereby waives any defenses that the liquidated damages are a penalty or do not bear a reasonable relation to the actual damages.

10. **Project Schedule.**

- a. Attached hereto as **Exhibit B** is the initial Project Schedule for each Project (based on Design Services furnished with the Interim Agreement) as prepared by the Design-Builder and accepted by the Owner.
 - i. The initial Project Schedule for each Project includes the Scheduled Substantial Completion Date and shows the sequencing of trades and work.
 - ii. Within sixty (60) days after the Notice to Proceed on the Campostella Project and within sixty (60) days prior to the commencement of Construction on

each of the other individual Projects, the Design-Builder shall submit to the Owner, for the Owner's acceptance, a more detailed baseline Project Schedule for that Project that satisfies the requirements set forth in Section 10.a.iii hereof. No amounts shall become payable to the Design-Builder for a Project until the Design-Builder has submitted this detailed baseline Project Schedule for such Project.

- iii. The detailed baseline Project Schedules shall be Critical Path Method ("CPM") schedules that show activities grouped by area of work or subcontract. They shall be time-scaled on a weekly basis and prepared at a level of detail and logic to schedule all salient features of the Work, including but not limited to construction by each trade, shop drawing and other submittals, placement of orders, manufacture and delivery information, testing, installation, and any and all other Work to be performed by the Design-Builder. Failure to include any element required for full and complete performance of a Project under the applicable Design-Build Contract shall not excuse the Design-Builder from its responsibilities under such Design-Build Contract, including but not limited to its obligation to complete the Work on or before the Scheduled Substantial Completion Date for such Project. The detailed baseline Project Schedules shall identify and describe each activity, state the duration of each activity, the calendar dates for early and late start and finish of each activity, and highlight all activities on the critical path. Float time shall be indicated for all activities and must be allocated to the best interest of completing the Work on or before the Scheduled Substantial Completion Dates. The detailed baseline Project Schedules shall also incorporate and show the Schedule of Values for the major components of the Work shown on such Project Schedules. The Owner's acceptance of the detailed baseline Project Schedules shall not indicate the Owner's agreement with or responsibility for the proposed or actual duration of any activity shown thereon.
 - iv. Subject to the General Conditions of Contract, time is of the essence in achieving the Substantial Completion of Work in accordance with the dates set forth in the accepted detailed Project Schedules. The Milestone Dates for certain portions of the Work (if applicable) are set forth in the initial Project Schedule and will be set forth on the detailed baseline Project Schedules. Subject to the General Conditions of Contract, time is of the essence in achieving the Scheduled Milestone Substantial Completion Dates of the portions of the Work that are the subject of the Milestone Dates.
- b. The Owner and the Design-Builder shall use their best commercially reasonable efforts to maintain the accepted detailed baseline Project Schedules, which can be modified by mutual written agreement of the Parties as circumstances warrant or as otherwise provided in Section 11.02 of the General Conditions of Contract. The Design-Builder will use its best commercially reasonable efforts to secure an expedited review and approval by any other governmental or private entity of applications made by the Design-Builder for permits, reviews, inspections or

approvals, and the City shall use its best commercially reasonable efforts to assist the Design-Builder in connection with such expedited review and approval of such required permits, reviews, inspections and approvals. The Design-Builder shall include in both the initial and detailed baseline Project Schedules sufficient allowance of time for such permitting, reviews, inspections and approvals. For each Project, the second and subsequent progress payments shall not become due and payable to the Design-Builder until the Owner has accepted the Design-Builder's detailed baseline Project Schedule submittal as required by Section 10.a.ii. and the Design-Builder has submitted with each monthly Application for Payment acceptable Project Schedule updates.

- c. The following CPM schedule terms will be part of the detailed baseline Project Schedules and monthly updates:
 - i. Written narratives are required with all schedule submissions and must include the following:
 - A. For the initial and detailed baseline Project Schedules, explain the Design-Builder's plan for meeting the Milestone Dates and the dates for Substantial Completion and Final Completion. Identify and explain assumptions, sequencing, and constraints such as manpower, material, and equipment for major Work categories.
 - B. Identify activities which are planned to be expedited by use of overtime or double shifts, including any work planned on Saturday, Sundays or holidays.
 - C. Describe calendars used and provide a listing of holiday and non-work periods.
 - D. For monthly progress updates, provide a narrative that describes problem areas, current and anticipated, delaying factors and their financial and construction impact, and an explanation of corrective action taken or proposed.
 - E. Describe actual Work accomplished during reporting period.
 - F. Provide a list of proposed modifications, additions, deletions and changes in logic to the approved Project Schedule.
 - ii. Total float time shall not be considered for the exclusive use or benefit of either the Owner or Design-Builder, but must be allocated in the best interest of completing the Work within the Scheduled Substantial Completion Dates.
 - iii. The critical path shall be defined as the longest connected chain of interdependent activities through the network schedule that establishes the minimum overall Project duration and contains no float.

- iv. The CPM construction Project Schedules shall be prepared using either Primavera P6, P3, or SureTrak software and submitted in native electronic and hard copy formats.
- v. Project Schedule calculations and out-of-sequence progress (if applicable) shall be handled through retained logic or progress override, as summarized in the monthly narrative agreed upon by the Parties.
- vi. Each Project Schedule activity shall as a minimum have codes identifying the following:
 - A. Phase
 - B. Area
 - C. Level
 - D. Location
 - E. Construction Division
 - F. Responsibility (Owner, Design-Builder, Design Consultant, Subcontractor, Third Party)
- vii. Proposed durations assigned to each Project Schedule activity shall be the Design-Builder's best estimate of time required to complete the activity.
- viii. Except for notice to proceed and required Milestone Dates, Substantial Completion dates and Final Completion dates, activities shall not be constrained by any means other than logic ties to predecessor and successor activities.
- ix. Relationships with start or finish lags may be used provided the lags can be logically explained.
- x. The inclusion of major Subcontractors in preparation of the baseline detailed Project Schedules and schedule updates is required. Progress meetings will be held with representatives of the Owner, Design-Builder, Design Consultants (as defined in **Exhibit C**) and Subcontractors whose presence may be deemed necessary or desirable.

11. **Plan of Finance.** The Owner will arrange to finance the costs of the Authorized Projects in a manner that results in the availability of funds in the amounts and at the times required to meet the projected needs for the Authorized Projects, subject to annual appropriation. The Owner will include in its annual budget proposals amounts reasonably necessary to finance the Authorized Projects. The Owner will provide reasonable evidence of funding for the Authorized Projects to the Design-Builder upon its request.

12. **Phase I – Design.**

- a. The Design Professional Services shall be furnished in strict accordance with this Agreement and all applicable Laws and Regulations as more specifically set forth in the General Conditions of Contract.
- b. The Design-Builder shall deliver, or cause to be delivered, to the Owner, a certificate from itself or its Design Professional Consultant that performs or supervises the performance of the Design Services relating to the Projects, which certificate shall be in substantially the form attached to this Agreement as **Exhibit E**.

13. **Phase II – Permitting and Approvals (public and private).**

- a. The Design-Builder shall be responsible for obtaining all necessary federal, state and local permits and approvals for the performance of the Projects in compliance with all applicable Laws and Regulations. The City shall waive all fees with respect to permits to be issued by the City. With respect to any such permits, the Design-Builder will exercise its best commercially reasonable efforts (with the exception of paying additional fees) to cause the permits to be written to provide that the Owner shall not be considered a “responsible party” for any permit violation committed by or arising from the action or inaction of the Design-Builder or its Subcontractors, and the Design-Builder shall indemnify, defend and hold the Owner harmless from any claims related to such permit violations for which the Design-Builder is responsible.
- b. In order to fully perform the Work, the Design-Builder may need to obtain permits, leases, easements, right-of-entry agreements, licenses or similar legal authority (generally, “Access Agreements”) from the owner(s) of property near or adjacent to the Projects sites. It shall be the Design-Builder’s sole responsibility to obtain such Access Agreements that it deems reasonable and necessary to the performance of the Work]; provided, however, that each such Access Agreement shall include a full, unconditional release of the Owner, its officers, directors and employees, with respect to any action, error, omission, claim, damage (including indirect, special and consequential damages) or liability that may arise from the Design-Builder’s, or its Subcontractor(s), use of such property. The Design-Builder shall file such Access Agreements with the Owner within five (5) days after fully executed and further, shall indemnify, defend and hold the Owner harmless with respect to any action, error, omission, claim, damage (including indirect, special and consequential) or liability that may arise from the Design-Builder’s or its Subcontractor’s, use of such property.
- c. In addition to the foregoing requirements, the Design-Builder shall indemnify the Owner, its officers, directors and employees, from and against any claims brought by a property owner with whom Design-Builder does not have an Access Agreement, but who suffers any loss or damage resulting from the Design-Builder’s performance of any Work under this Agreement.

14. **Phase III – Construction.**

- a. All Construction provided or caused to be provided by the Design-Builder shall be performed pursuant to the Contract Documents and in full compliance with all applicable Laws and Regulations and applicable permits, both public and private.
- b. No later than thirty (30) days prior to the start of the Construction on any Project, the Design-Builder shall submit or cause to be submitted to the Owner the Design-Builder's staffing plan for such Construction, together with the names, qualifications, and years of management experience of the individuals listed. The Owner, acting reasonably, will have the right to object in writing within fourteen (14) days to any persons included on the staffing plan, in which case the Design-Builder shall substitute persons acceptable to the Owner (acting reasonably). No subsequent changes to such approved staffing plan will be made that are reasonably objected to by the Owner (except for changes that are outside the control of the Design-Builder, such as a person leaving its employ). The Owner shall not make unreasonable objections to the staffing plan or any such proposed change.
- c. The Owner and its consultants shall be afforded reasonable access to the Construction sites for the Projects to ensure that the Design-Builder's activities are acceptable to the Owner and are being performed in accordance with the Contract Documents, and that the Work is being properly maintained.
- d. All construction access points, roadways, paths, and other areas used for ingress and egress, site access, material handling and storage, and staging, shall be protected with sediment and erosion control measures in accordance with federal, state, and local Laws and Regulations.
- e. All construction access points, roadways, paths, and other areas used for ingress and egress, site access, material handling and storage, and staging shall be restored to their original condition, ordinary wear and tear other than Construction damage excepted, or as otherwise required by federal, state and local permits and/or agreements with the respective landowners.
- f. The Design-Builder shall deliver, or cause to be delivered, to the Owner, a certificate from itself or its consultant or Subcontractor that performs or supervises the performance of the Construction relating to the Projects, which certificate shall be in substantially the form attached to this Agreement as **Exhibit F**.

15. **Stop Work and Termination for Cause.**

- a. **The Owner's Right to Stop Work.**
 - i. At any time and without cause, the Owner may suspend the Work or any portion thereof on a Project for a period of not more than ninety (90) consecutive days by notice in writing to the Design-Builder that will fix the date on which Work on such Project will be resumed. Design-Builder shall resume the Work on the date so fixed. The Design-Builder shall be granted

an adjustment in the Contract Price(s) or an extension of the Contract Time(s), or both for such Project, directly attributable to any such suspension if the Design-Builder makes a Claim therefor as provided in Section 9.03 of the General Conditions of Contract. Provided, however, if the Owner suspends the Work or any portion thereof pursuant to the General Conditions of Contract because the Design-Builder has continued in violation of a Design-Build Contract beyond the cure period set forth in Section 15.b.ii below, then the Design-Builder shall not receive any adjustment in the Contract Price or extension of the Contract Time(s).

b. The Owner's Right to Perform and Terminate for Cause.

- i. If the Design-Builder fails in respect of any Project to (i) provide or cause to be provided a sufficient number of skilled workers to perform the Work under the applicable Design-Build Contract; (ii) supply the materials or equipment required to perform the Work under the applicable Design-Build Contract; (iii) comply with applicable Laws and Regulations; (iv) timely pay, without cause, Design Consultants or Subcontractors; (v) prosecute the Work with promptness and diligence to ensure that the Work is completed by the Contract Time(s), as such times may be adjusted; or (vi) perform material obligations under the Contract Documents; or if the Design-Builder (i) becomes insolvent; (ii) makes a general assignment for the benefit of its creditors; (iii) commences or consents to any action seeking reorganization, liquidation or dissolution under any law relating to bankruptcy or relief of debtors; or (iv) commences or consents to any action seeking appointment of a receiver or trustee for itself or its assets, then the Owner, in addition to any other rights and remedies provided in the Contract Documents or by law, shall have the rights set forth in Articles 15.b.ii and 15.b.iii below.
- ii. Upon the occurrence of an event of default set forth in Article 15.b.i above with respect to any Project, the Owner may provide written notice to the Design-Builder that it intends to terminate the applicable Design-Build Contract unless the cited default is cured, or has reasonably commenced to be cured, within fourteen (14) days of the Design-Builder's receipt of such notice. If the Design-Builder fails to cure, or reasonably commence to cure, such problem, then the Owner shall give a second written notice to the Design-Builder of its intent to terminate the Design-Build Contract within an additional fourteen (14) day period. If the Design-Builder, within such second fourteen (14) day period, fails to cure, or reasonably commence to cure, such default, then the Owner may declare the applicable Design-Build Contract terminated for default by providing written notice to the Design-Builder of such declaration. The Owner may not terminate a Design-Build Contract for cause without following the two-step notice process set forth above. The Owner may provide copies of any notices to the surety on the performance bond and, in the Owner's sole discretion, elect to pursue any remedies that may be available under the terms of the performance bond in lieu of proceeding with the termination as described in this Article 15.b.ii.

- iii. Upon terminating a Design-Build Contract pursuant to Article 15.b.ii above, the Owner may enter upon the premises and take possession, for the purpose of completing the Work, of all materials, equipment, tools, appliances and other items for use in the applicable Project which have been specifically purchased or provided for the performance of the Work on such Project, all of which the Design-Builder hereby transfers, assigns and sets over to the Owner for such purpose, and to employ any person or persons to complete the Work on such Project and provide all of the required labor, services, materials, equipment and other items. In the event of such termination, the Design-Builder shall not be entitled to receive any further payments under the applicable Design-Build Contract until the Work shall be finally completed in accordance with the Contract Documents. If the Owner's cost and expense of completing the Work exceeds the unpaid balance of the Contract Price for such Project, then the Design-Builder shall be obligated to pay the difference to the Owner. Such costs and expense shall include not only the cost of completing the Work, but also losses, damages (direct, indirect and special), costs and expenses, including attorneys' fees and expenses, incurred by the Owner in connection with the procurement and defense of claims arising from the Design-Builder's default.
- iv. If the Owner improperly terminates a Design-Build Contract for cause, the termination for cause will be converted to a termination for convenience in accordance with the provisions of Article 16 hereof and the Owner will reimburse the Design-Builder for such costs and expenses incurred in connection with the improper termination as provided in Article 16.

c. **The Design-Builder's Right to Stop Work.**

- i. The Design-Builder may, in addition to any other rights afforded under the Contract Documents or at law, stop the Work for any Project upon the Owner's failure to pay the Design-Builder for portions of the Work properly performed on such Project in accordance with the Contract Documents.
- ii. Should the event set forth in Article 16.c.i above occur, the Design-Builder has the right to provide the Owner with written notice that the Design-Builder will stop the Work unless said event is cured within fourteen (14) days from the Owner's receipt of the Design-Builder's notice. If the Owner does not cure the default within such fourteen (14) day period, the Design-Builder may stop the Work. If the Owner later cures the default and the parties agree to resume the Work on the Project, then the Design-Builder shall be entitled to an equitable adjustment to the Contract Price, the Guaranteed Maximum Price and Contract Time(s) if the Design-Builder is not in default under the Design-Build Contract and is otherwise prepared to proceed with the performance of the Work on such Design-Build Contract in accordance with the provisions of the Contract Documents.

- iii. Notwithstanding the foregoing, the Design-Builder shall not stop Work because of any good-faith dispute with the Owner about all or any portion of any amount for which the Design-Builder has submitted an Application for Payment as long as the Owner pays to the Design-Builder such portion of any Application for Payment about which there is no good-faith dispute.

d. **The Design-Builder's Right to Terminate for Cause.**

- i. The Design-Builder, in addition to any other rights and remedies provided in the Contract Documents or by law, may terminate the Contract for cause for the following reasons specified in clauses ii. through iv. below:
- ii. The Work has been stopped for ninety (90) consecutive days, or more than one-hundred twenty (120) days during the duration of the Project, because of an order by a court or any government authority having jurisdiction over the Work, or orders by the Owner under Article 15.a.i hereof, provided that such stoppages are not due to the acts or omissions of the Design-Builder or anyone for whose acts the Design-Builder may be responsible. This provision shall not apply and shall not be a basis for termination to the extent that any stoppage is related to or arises as a result of any restrictions set forth in or applicable to a permit issued by a regulatory authority relating to the Work.
- iii. The Owner's failure to provide the Design-Builder with any information, permits or approvals that are the Owner's responsibility under the Contract Documents which result in the Work being stopped for ninety (90) consecutive days, or more than one-hundred twenty (120) days during the duration of the Project, even though the Owner has not ordered the Design-Builder in writing to stop and suspend the Work pursuant to Article 15.a.i hereof and such failure of the Owner was not due to the acts or omissions of the Design-Builder or anyone for whose acts the Design-Builder may be responsible.
- iv. The Owner's failure to cure the problems set forth in Article 15.c.i above after the Design-Builder has stopped the Work.
- v. Upon the occurrence of an event set forth in Article 15.d.ii. through Article 15.d.iv. above, the Design-Builder may provide written notice to the Owner that it intends to terminate the Design-Build Contract unless the problem cited is cured, or commenced to be cured, within ten (10) days of the Owner's receipt of such notice. If the Owner fails to cure, or reasonably commence to cure, such problem, then the Design-Builder may give a second written notice to the Owner of its intent to terminate within an additional ten (10) day period. If the Owner, within such second ten (10) day period, fails to cure, or reasonably commence to cure, such problem, then the Design-Builder may declare the Design-Build Contract terminated for default by providing written notice to the Owner of such declaration. In such case, the Design-Builder shall be entitled to recover in the same manner as if the Owner had terminated

the Design-Build Contract for its convenience under Article 16 of this Agreement.

e. **Bankruptcy of the Owner or the Design-Builder.**

- i. If either the Owner or the Design-Builder institutes or has instituted against it a case under the United States Bankruptcy Code (such Party being referred to as the “Bankrupt Party”), such event may impair or frustrate the Bankrupt Party’s ability to perform its obligations under the Contract Documents. Accordingly, should such event occur:
- ii. The Bankrupt Party, its trustee or other successor, shall furnish, upon request of the non-Bankrupt Party, adequate assurance of the ability of the Bankrupt Party to perform all future material obligations under the Contract Documents, which assurances shall be provided within ten (10) days after receiving notice of the request; and
- iii. The Bankrupt Party shall file an appropriate action with the bankruptcy court to seek assumption or rejection of any Design-Build Contract within sixty (60) days of the institution of the bankruptcy filing and shall diligently prosecute such action.
- iv. If the Bankrupt Party fails to comply with the foregoing obligations listed in clauses ii. and iii. above, the non-Bankrupt Party shall be entitled to request the bankruptcy court to reject any Design-Build Contract, declare such Design-Build Contract terminated and pursue any other recourse available to the non-Bankrupt Party under this Article 15.
- v. The rights and remedies under Article 15.e.i above shall not be deemed to limit the ability of the non-Bankrupt Party to seek any other rights and remedies provided by the Contract Documents or by law, including its ability to seek relief from any automatic stays under the United States Bankruptcy Code or the right of the Design-Builder to stop Work under any applicable provision of these General Conditions of Contract.

16. **Termination for Convenience.** Upon fourteen (14) days written notice to the Design-Builder, the Owner may, for its convenience and without cause, elect to terminate this Agreement, in whole or in part. In such event, the Owner shall pay the Design-Builder for the following:

- a. All Work properly performed by the Design-Builder in accordance with each Design-Build Contract;
- b. The losses and reasonable costs and expenses related to the Projects which are attributable to such termination, with such reasonable costs and expenses including (without limitation) verifiable demobilization costs and amounts due in settlement of any terminated subcontracts; and

- c. Overhead and profit for all portions of the Work properly performed in accordance with the Contract Documents through the date of termination.
17. **Payment Bonds, Performance Bonds, and Other Security.** The Design-Builder will maintain performance and payment Bonds for each Project in an amount not less than the Contract Price for each Design-Build Contract. The provisions of Section 5.01 of the General Conditions of Contract are hereby incorporated by this reference into this Agreement. The Design-Builder shall provide such Bonds in a form substantially in the form of **Exhibit G** hereto no later than thirty (30) days prior to the commencement of Construction on each individual Project.
18. **Insurance.** The provisions of Sections 5.02, 5.03 and 5.04 of the General Conditions of Contract are hereby incorporated by this reference into this Agreement.
19. **Representations and Warranties.**
- a. The Owner hereby represents and warrants to the Design-Builder as follows:
 - i. The Owner is a municipal corporation duly chartered and operating under the laws of the Commonwealth of Virginia and has full power, right and authority to execute, deliver and perform its obligations under, in accordance with and subject to the terms and conditions of this Agreement.
 - ii. Each person executing this Agreement on behalf of the Owner is duly authorized to execute each such document on behalf of the Owner.
 - iii. Neither the execution and delivery by the Owner of this Agreement and any other documents executed concurrently herewith to which the Owner is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or violation of any other agreements or instruments to which it is a party or by which it is bound.
 - iv. There is no action, suit, proceeding, investigation or litigation pending and served on the Owner as of the date of this Agreement which challenges the Owner's authority to execute, deliver or perform, or the validity or enforceability of this Agreement and the other related documents to which the Owner is a party, or which challenges the authority of the Owner official executing this Agreement or the other related documents, and the Owner has disclosed to the Design-Builder any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Owner is aware.
 - b. The Design-Builder hereby represents and warrants to the Owner as follows:
 - i. The Design-Builder represents that S.B. Ballard does business in Virginia as a corporation and in signing this Agreement as well as each Design-Build Contract, has full power and authority to bind itself to the terms thereof.

- ii. The Design-Builder has taken or caused to be taken all requisite action to authorize the execution and delivery of, and the performance of its obligations under this Agreement and the other related documents to which the Design-Builder is a party.
- iii. Each person executing this Agreement or any other related document on behalf of the Design-Builder has been or will at such time be duly authorized to execute each such document on behalf of the Design-Builder.
- iv. Neither the execution and delivery by the Design-Builder of this Agreement and the other related documents to which the Design-Builder is a party, nor the consummation of the transactions contemplated hereby or thereby, is in conflict with or will result in a default under or a violation of the governing instruments of the Design-Builder or any other agreements or instruments to which it is a party or by which it is bound.
- v. There is no action, suit, proceedings, investigation or litigation pending and served on the Design-Builder which challenges the Design-Builder's authority to execute, deliver or perform, or the validity or enforceability of this Agreement and the other related documents to which the Design-Builder is a party, or which challenges the authority of the Design-Builder official executing this Agreement or the other related documents; and the Design-Builder has disclosed to the Owner any pending and unserved or threatened action, suit, proceeding, investigation or litigation with respect to such matters of which the Design-Builder is aware.
- vi. The Design-Builder is in material compliance with all laws, regulations and ordinances applicable to the Design-Builder or its activities in connection with this Agreement and the other related documents.
- vii. The Design-Builder is a financially viable and capable entity and fully able to perform its obligations under this Agreement.

20. **Resolution of Disputes, Claims and Other Matters.** Disputes, claims and other matters in question between the Parties under the Contract shall be resolved as follows:

- a. The general Claims process is set forth in Section 9.03 of the General Conditions of Contract. In the event of a claim dispute arising under or related to this Agreement or any Design-Build Contract that the Parties are unable to resolve through the Claims process set forth in Section 9.03 of the General Conditions of Contract, the Parties shall submit such claim or dispute to either the Circuit Court of the City of Norfolk, Virginia or the United States District Court for the Eastern District of Virginia, and may pursue all available appeals from such courts. These two courts shall have exclusive and binding jurisdiction and venue over any and all claims arising under the Contract. The parties voluntarily waive any and all rights to trial by jury. The fact finder shall be the court, sitting without a jury.

- b. Prior to filing litigation, the Parties shall first endeavor to resolve any disputes or claims between them through direct negotiations, and if such direct negotiations fail, by non-binding mediation, with the site of the mediation being held in or near the City of Norfolk, Virginia. If the Parties agree to attempt mediation, then within thirty (30) days of receipt of the notice requesting mediation, the Design-Builder and the Owner shall attend a formal mediation conducted by a single, impartial mediator appointed by The McCammon Group. The Parties shall share evenly the fees of the mediator and each shall bear its own costs involved in participating in the mediation. If they opt to mediate, the Owner and the Design-Builder shall participate in the mediation process in good faith. The process shall be concluded within forty-five (45) days of filing of the notice requesting mediation. Should the dispute or claim remain unresolved following mediation or should the time limit described in Article 20.a occur during the course of mediation, either Party may proceed under Article 20.a in order to preserve its rights, but mediation shall not extend the time period set forth in Article 20.a. If the claim or dispute is not resolved by mediation, failure to file an appeal of the other Party's final decision as described in Article 20.a within six (6) months after such decision is issued in writing shall result in the other Party's final written decision becoming final and subject to no further appeal.
- c. Nothing in Articles 20.a or b shall prevent a Party from seeking temporary injunctive or other temporary equitable relief in the Circuit Court of the City of Norfolk, Virginia if circumstances so warrant.
- d. In the event of any dispute, claim, or other matter in question arising, the Design-Builder shall continue its performance diligently during its pendency as if no dispute, claim or other matter in question had arisen. During the pendency of any dispute in connection with the payment of moneys, the Design-Builder shall be entitled to receive payments for non-disputed items.

21. **Notices.** All notices and demands by any party to any other shall be given in writing and sent by a nationally recognized overnight courier or by United States certified mail, postage prepaid, return receipt requested, and addressed as follows:

To the Owner: City Manager
 810 Union Street, Suite 1100
 Norfolk, Virginia 23510

With copies to: City Attorney
 810 Union Street, Suite 900
 Norfolk, Virginia 23510

To the Design-Builder: S. B. Ballard Construction Company
2828 Shipps Corner Road
Virginia Beach, Virginia 23453
Attention: Stephen B. Ballard, President

With copies to: Charles V. McPhillips, Esq.
Kaufman & Canoles, P.C.
150 W. Main Street, Suite 2100
Norfolk, Virginia 23510

Any party may, upon prior notice to the others, specify a different address for the giving of notice. Notices shall be effective one (1) day after sending if sent by overnight courier or three (3) days after sending if sent by certified mail, return receipt requested.

22. **Successors and Assigns.** Except as expressly otherwise provided, all of the terms, covenants and conditions hereof shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns. Neither this Agreement nor any Design-Build Contract may be assigned without the prior written consent of all of the Parties. Notwithstanding the foregoing, if financing is obtained for the Projects, the Parties may collaterally assign this Agreement and any Design-Build Contract to a lender providing such financing. Each Party hereby consents to collateral assignment of this Agreement and any Design-Build Contract in favor of such lender or its related mortgagee(s)/trustee(s) of deed(s) of trust, in a form reasonably satisfactory to such mortgagee(s)/trustee(s), provided that no such assignment shall release either Party from its obligations under this Agreement or any Design-Build Contract.

23. **Time of the Essence.** The time to complete the Projects is of the essence of this Agreement and each Design-Build Contract. The Design-Builder shall proceed expeditiously with adequate forces and make diligent efforts to perform all portions of the Work in accordance with the Project Schedule and the Milestone Dates for each Project, and the Design-Builder shall achieve Substantial Completion of the Work and Final Completion of the Work within the completion times and Milestone Dates specified in the applicable Design-Build Contract and Project Schedule. The Owner will cooperate reasonably with the Design-Builder's efforts to keep the Projects on schedule.

24. **Independent Contractor.** It is expressly understood and agreed by the Parties hereto that the Design-Builder, in performing its obligations under the Contract, shall be deemed an independent contractor and not an agent, employee or partner of the Owner.

25. **No Waiver.** The failure of the Owner or the Design-Builder to insist upon the strict performance of any provisions of the Contract, the failure of the Owner or the Design-Builder to exercise any right, option or remedy hereby reserved, or the existence of any course of performance hereunder shall not be construed as a waiver of any provision hereof or of any such right, option or remedy or as a waiver for the future of any such provision, right, option or remedy or as a waiver of a subsequent breach thereof. The consent or approval by the Owner of any act by the Design-Builder requiring the Owner's consent or approval shall not be construed to waive or render unnecessary the requirement for the Owner's consent or approval of any subsequent similar act by

the Design-Builder. No provision of the Contract shall be deemed to have been waived unless such waiver shall be in writing signed by the Party to be charged. Further, any approvals required by the Owner shall likewise be in writing.

26. **Cooperation.** The Parties agree to cooperate to achieve the objectives of the Contract and to use reasonable and good faith efforts to resolve all disputes and disagreements that may arise hereunder. Each Party agrees to designate representatives with the authority to make decisions binding upon such Party (subject in the case of the Owner to those matters requiring an appropriate vote of its governing body) so as to not unduly delay the Project Schedule.

27. **Counterparts.** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but both of such counterparts together shall be deemed to be one and the same instrument. It shall not be necessary in making proof of this Agreement or any counterpart hereof to produce or account for the other counterpart.

28. **Entire Agreement and Order of Precedence.** This Agreement and the other Contract Documents, and the Exhibits attached hereto and thereto set forth all the covenants, promises, agreements, conditions and understandings between the Design-Builder and the Owner concerning the Projects, and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than as herein set forth. No alteration, amendment, change or addition to this Agreement shall be binding upon the Design-Builder or the Owner unless reduced to writing in a formal amendment signed by each Party. Design-Builder's Conceptual Proposal and Design-Builder's Detailed Proposal are incorporated by reference for purposes of providing details concerning the requirements of this Agreement. In the event of any conflict or inconsistency between or among the meaning of any provision of the Contract Documents, such meaning, and the Contract Documents, shall be interpreted in the following order of precedence: each Design-Build Contract, including any exhibits and attachments thereto, and any written change orders issued thereunder; this Agreement, including any exhibits and attachments hereto as well as any modifications and amendments thereto; the General Conditions of Contract, including any modifications, amendments or change orders thereto; and the Contract Documents prepared and approved in accordance with this Agreement and the General Conditions of Contract. Design-Builder's Conceptual Proposal and Design-Builder's Detailed Proposal are not intended to contradict this Agreement, and in the event of any inconsistencies or conflicts, this Agreement shall prevail. In the event of any conflict or inconsistency between the provisions of Design-Builder's Conceptual Proposal and Design-Builder's Detailed Proposal, Design Builder's Detailed Proposal shall have control over Design Builder's Conceptual Proposal.

29. **Governing Law.** This Agreement and the Contract shall be governed by, and construed in accordance with, the laws of the Commonwealth of Virginia. The provisions of this Agreement and the Contract shall not be construed in favor of or against either Party but shall be construed according to their fair meaning as if both Parties jointly prepared this Agreement.

30. **Annual Appropriation; Filing With Auditor of Public Accounts.** The City has previously appropriated \$48,250,000 to fund the Owner's financial obligations in connection with the Projects. If any such necessary appropriation has not been made within a time period that would allow the Owner to make progress payments in accordance with this Agreement and any of the Design-Build Contracts, the Design-Builder may, at its election, and without liability to the

Owner, stop the Work, in which case the rights and obligations of the Parties shall be governed by Article 16 hereof as if all of the Design-Build Contracts had been terminated by the Owner for convenience. The remaining financial obligations of the Owner contained in the Agreement are subject to appropriation by the City Council. Within thirty (30) days after the date of this Agreement, the Owner shall submit a copy of the Contract to the Auditor of Public Accounts, to the extent required by Section 56-575.9(F) or Section 56-575.18.

31. **Conditions Precedent and Subsequent to Agreement's Effectiveness.** It shall be a condition precedent to this Agreement's effectiveness that: (i) it first be approved by the City Council as evidenced by the signature of the City Manager on behalf of the Owner on the signature pages hereof; and (ii) it shall be executed in full with all exhibits attached by the Owner and the Design-Builder on or before December 22, 2014.

32. **Financial Statements.** The Design-Builder agrees to provide the Owner with copies of complete and current financial statements for the Design-Builder on an annual basis. The financial statements provided need not be audited, but if the Design-Builder does have the financial statements audited, they shall supplement their initial submission of unaudited financial statements for the year concerned with copies of audited statements within thirty (30) days after they become available. The Design-Builder hereby designates such financial statements as confidential proprietary information exempt from release under the Virginia Freedom of Information Act, and the Owner agrees with that designation.

33. **Joint and Several Obligations.** The obligations and liabilities of Owner hereunder shall be the joint and several obligations and liabilities of the City and NPS.

34. **Federal Immigration Law.** The Design-Builder does not, and shall not during the performance of this Agreement knowingly employ an unauthorized alien as defined in the federal Immigration Reform and Control Act of 1986.

35. **Authorization to Transact Business in the Commonwealth.** Design-Builder hereby represents that it is organized as a stock or non-stock corporation, limited liability company, business trust, or limited partnership or registered as a registered limited liability partnership and is authorized to transact business in the Commonwealth as a domestic or foreign business entity if so required by Title 13.1 or Title 50 or as otherwise required by law.

36. **Documents Incorporated by Reference and Exhibits.** The following documents are incorporated by reference:

Design-Builder's Conceptual Proposal, dated November 26, 2013

Design-Builder's Detailed Proposal, dated January 21, 2014

The following exhibits are hereby deemed to be part of this Agreement:

Exhibit A:

Revised Detailed Proposal dated November 21, 2014

Exhibit B:

The Projects Schedule

Exhibit C:

The Projects Budget

Exhibit D:

General Conditions of Contract

Exhibit E:

Form of Design Professional's Certificate

Exhibit F:

Form of Design-Builder's Certificate

Exhibit G:

Form of Payment and Performance Bonds

IN WITNESS WHEREOF, the Parties have executed this Comprehensive Agreement as of the day and year first above written.

CITY OF NORFOLK

By: _____
Marcus D. Jones, City Manager

Attest:

City Clerk

Contents Approved:

Acting Director of Public Works

Approved as to Form and Correctness:

Martha P. McGann
Deputy City Attorney

NORFOLK PUBLIC SCHOOLS

By: _____
Dr. Samuel T. King, Superintendent

S.B. BALLARD CONSTRUCTION COMPANY

By: _____
President

By: _____
Project Executive

CERTIFICATION OF FUNDING

I hereby certify that the money required for this Agreement is in the City Treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose.

Account No.: _____

Amount \$ _____

Contract # _____

Vendor Code: _____

Business License #: _____

Director of Finance

Date

EXHIBIT A

Revised Detailed Proposal dated November 21, 2014

[to be attached]

EXHIBIT B

The Projects Schedule

[to be attached]

EXHIBIT C

The Projects Budget

[to be attached]

EXHIBIT D

General Conditions of Contract

[to be attached]

EXHIBIT E

Form of Design Professional's Certificate

[Date]
City Manager
City of Norfolk
XXXX
XXXX

Re: **xxxxxx** (the "Projects")

Gentlemen:

The City of Norfolk, Virginia and Norfolk Public Schools (collectively, the "Owner") and S. B. Ballard Construction Company (the "Design-Builder") have entered into that certain Comprehensive Agreement (the "Agreement") dated _____, 2014, under which the Design-Builder has agreed to provide all design, permitting, construction, material, equipment, services and labor and related services in connection with the Project. The undersigned Design-Builder has caused the undersigned RRMM Architects ("Design Consultant") to perform design services for the Design-Builder in connection with the design of the Projects, including but not limited to the preparation of drawings and specifications on which the construction of the Projects is based (the "Drawings and Specifications").

The undersigned Design-Builder and Design Consultant have reviewed the completed construction of the Projects in relationship to the Drawings and Specifications and the conformity and compliance of the completed Projects with applicable Laws and Regulations as defined in the General Conditions of Contract. Based upon these reviews and upon due professional investigation, it is the undersigned's professional opinion that:

1. The Drawings and Specifications have been prepared and are in compliance with all applicable Laws and Regulations relating to the Projects.
2. The construction of the Projects has been completed, in all material respects, in conformity with the Drawings and Specifications.
3. The Projects comply in all material respects with all applicable Laws and Regulations.
4. All permits, licenses, approvals and waivers from all local, state and federal authorities having jurisdiction over the Projects required in connection with the design and construction of the Projects (including, without limitation, all required building permits and a permanent certificate of occupancy) have been obtained and are in full force and effect and the Project, as constructed, comply in all material respects with all such permits, licenses, approvals and waivers.

The undersigned agree that the City of Norfolk is a third party beneficiary of the design services performed and that the City of Norfolk and its affiliates and subsidiaries are entitled to

rely upon the certifications made by the undersigned herein. The undersigned further agree that the City of Norfolk shall be the owner of all of the Design Consultant's Work Product and intellectual property for the Projects, as set forth in the Agreement.

The undersigned Design Consultant is a licensed architect, and the person or persons executing this Certificate have the power and authority to execute and deliver this Certificate.

The Design-Builder and the Design Consultant agree that the Owner and its affiliates and subsidiaries are entitled to rely upon the certifications made by the undersigned herein.

Very truly yours,

xxxxxx

By:_____

Name:_____

Title:_____

Date:_____

RRMM ARCHITECTS

By:_____

Name:_____

Title:_____

Date:_____

EXHIBIT F

Form of Design-Builder's Certificate

[Date]

City Manager
City of Norfolk
XXXX
XXXX

Re: xxxxxx(the "Projects")

Gentlemen:

The City of Norfolk, Virginia and Norfolk Public Schools (the "Owner") and S. B. Ballard Construction Company (the "Design-Builder") have entered into that certain Comprehensive Agreement (the "Agreement") dated _____, 2014, under which the Design-Builder has agreed to provide design, permitting, construction, material, equipment, services and labor and related services in connection with the Projects.

The undersigned Design-Builder has been responsible for the completion of the Projects in accordance with the Agreement. Design-Builder has overseen and supervised the performance of the Work as defined in the Agreement as performed by its employees and by subcontractors, sub-subcontractors, suppliers and materialmen retained by the Design-Builder in connection with the performance of the Work. The Design-Builder has inspected the completed Work and has identified to the Owner, to the best of its knowledge, any portions of the Work that do not conform to the requirements of the Agreement. In connection with the performance of the Work, the Design-Builder certifies to the Owner that:

1. The Projects has been completed in all material respects, in accordance with the Agreement, the General Conditions of Contract, and all applicable Laws and Regulations.
2. All permits, licenses, approvals and waivers from all local, state and federal authorities having jurisdiction over the Projects and private landowners required in connection with the construction of the Projects (including, without limitation, all required environmental and land disturbance permits) have been obtained and are in full force and effect, and the Projects, as completed, comply in all material respects with all such permits, licenses, approvals and waivers.
3. All subcontractors, sub-subcontractors, suppliers, and materialmen who have performed services, supplied materials or provided labor in connection with the performance of the Work have been paid.

4. The Design-Builder has delivered or caused to be delivered to the Owner all guarantees, warranties and all other documents or items required to be delivered to the Owner under the Agreement and the General Conditions of Contract following Substantial Completion of the Work.

5. The Design-Builder will complete or cause to be completed all punch list items identified on behalf of the Owner following Substantial Completion.

6. The Design-Builder is a general contractor, licensed and in good standing with the Commonwealth of Virginia.

7. The Design-Builder has performed or will perform in the future all warranty obligations required under the Agreement and the General Conditions of Contract.

The Design-Builder agrees that the Owner and its affiliates and subsidiaries are entitled to rely upon the certifications made by the undersigned herein.

The persons executing this Certificate have the power and authority to execute and deliver this Certificate.

Very truly yours,

S.B. BALLARD CONSTRUCTION COMPANY

By:_____

Name:_____

Title:_____

Date:_____

EXHIBIT G

Form of Payment and Performance Bonds

[see attached]

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